

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RANDOLPH L. MOORE,
Petitioner,
v.

WILLIAM GITTERE, *et al.*,
Respondents.

Case No. 2:13-cv-00655-JCM-DJA

ORDER

In this capital habeas corpus action, the Court ruled on Respondents' motion to dismiss (ECF No. 71) on February 26, 2021. See Order entered February 26, 2021 (ECF No. 139). On March 4, 2021, the petitioner, Randolph L. Moore, represented by appointed counsel, filed a motion for reconsideration of the order resolving the motion to dismiss (ECF No. 140). Respondents filed an opposition to that motion on March 18, 2021 (ECF No. 141), and Moore filed a reply on March 23, 2021 (ECF No. 142). The Court will deny Moore's motion for reconsideration and will reset the deadline for Respondents to file an answer.

A district court possesses "inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (citations and internal quotation marks omitted); see also Fed. R. Civ. P. 54(b) (interlocutory orders "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the

controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

Moore’s motion for reconsideration focuses on Part IIIC of the February 26, 2021 order, which concerns application of the procedural default doctrine, and which is as follows:

C. Procedural Default

A federal court will not review a claim for habeas corpus relief if the decision of the state court denying the claim rested—or, in the case of a technically exhausted claim, would rest—on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). The Court in *Coleman* stated the effect of a procedural default as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

A state procedural bar is “independent” if the state court explicitly invokes the procedural rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995). A state court’s decision is not “independent” if the application of a state’s default rule depends on a consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000). Also, if the state court’s decision fails “to specify which claims were barred for which reasons,” the Ninth Circuit has held that the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio v. Crawford*, 306 F.3d 742, 775 (9th Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003).

A state procedural rule is “adequate” if it is “clear, consistently applied, and well-established at the time of the petitioner’s purported default.” *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation marks omitted). A discretionary state procedural rule can serve as an adequate ground to bar federal habeas review because, even if discretionary, it can still be “firmly established” and “regularly followed.” *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Also, a rule is not automatically inadequate “upon a showing of seeming inconsistencies” given that a state court must be allowed discretion “to avoid the harsh results that sometimes attend

consistent application of an unyielding rule.” *Walker v. Martin*, 562 U.S. 307, 320 (2011).

In *Bennett v. Mueller*, 322 F.3d 573, 585–86 (9th Cir. 2003), the court of appeals announced a burden-shifting test for analyzing adequacy. Under *Bennett*, the State carries the initial burden of adequately pleading “the existence of an independent and adequate state procedural ground as an affirmative defense.” *Id.* at 586. The burden then shifts to the petitioner “to place that defense in issue,” which the petitioner may do “by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.” *Id.* Assuming the petitioner has met his burden, “the ultimate burden” of proving the adequacy of the state bar rests with the State, which must demonstrate “that the state procedural rule has been regularly and consistently applied in habeas actions.” *Id.*

The Ninth Circuit Court of Appeals has held Nev. Rev. Stat. § 34.810 to be inadequate to bar federal review in capital habeas cases. See *Valerio*, 306 F.3d at 778, *Petrocelli v. Angelone*, 248 F.3d 877, 888 (9th Cir. 2001), and *McKenna*, 65 F.3d at 1488–89. Moore’s reference to these holdings is sufficient to place the adequacy of the bar in issue. The relevant dates in *McKenna* and *Petrocelli* were 1983 and 1985. See *McKenna*, 65 F.3d at 1487–88; *Petrocelli*, 248 F.3d at 886. The court in *Valerio* found that the bar was inadequate as of 1990. *Valerio*, 306 F.3d at 778. Respondents have “the burden of demonstrating that, since *Valerio*, state courts have begun to regularly and consistently apply § 34.810 to habeas cases.” *Riley v. McDaniel*, 786 F.3d 719, 722 n.4 (9th Cir. 2015). See also *King v. LaMarque*, 464 F.3d 963, 967 (9th Cir. 2006). Respondents have not established the adequacy of § 34.810 as a procedural bar.

On the other hand, the Ninth Circuit Court of Appeals has held Nev. Rev. Stat. §§ 34.726 and 34.800 to be adequate to support application of the procedural default doctrine. See *Williams v. Filson*, 908 F.3d 546, 579–80 (9th Cir. 2018); *Ybarra v. McDaniel*, 656 F.3d 984, 990 (9th Cir. 2011); *Valerio*, 306 F.3d at 778; *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000). *Moran v. McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir. 1996). Moore does not place the adequacy of those rules at issue. Accordingly, this court concludes that Nev. Rev. Stat. §§ 34.726 and 34.800 are adequate to support application of the procedural default doctrine in this case.

To demonstrate cause for a procedural default, the petitioner must “show that some objective factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve as cause,

1 to overcome the procedural default of a claim of ineffective assistance of
 2 trial counsel. In *Martinez*, the Supreme Court noted that it had previously
 3 held, in *Coleman*, that “an attorney’s negligence in a postconviction
 4 proceeding does not establish cause” to excuse a procedural default.
 5 *Martinez*, 566 U.S. at 15. The *Martinez* Court, however, “qualif[ied]
 6 *Coleman* by recognizing a narrow exception: inadequate assistance of
 7 counsel at initial-review collateral proceedings may establish cause for a
 8 prisoner’s procedural default of a claim of ineffective assistance at trial.”
 9 *Id.* at 9. The Court described “initial-review collateral proceedings” as
 10 “collateral proceedings which provide the first occasion to raise a claim of
 11 ineffective assistance at trial.” *Id.* at 8.

12 Beyond the question of the adequacy of NRS §§ 34.726, 34.800,
 13 and 34.810, the Court will not, in this order, address the remainder of the
 14 issues raised by the parties concerning the alleged procedural default of
 15 Moore’s claims. The question of prejudice, in the cause and prejudice
 16 analysis regarding any alleged procedural defaults in this case, is
 17 intertwined with the question of the merits of the particular claims, such
 18 that those issues will be better addressed in conjunction with the merits,
 19 after Respondents file an answer and Moore a reply. Furthermore, it
 20 appears that, following the Court’s ruling in this order regarding the
 21 question of the exhaustion of Moore’s claims, further briefing of the
 22 procedural default issues in the parties’ answer, reply, and response to
 23 reply, will be beneficial. The Court will, therefore, decline to address the
 24 procedural default issues raised by this motion—other than the question of
 25 the adequacy of NRS §§ 34.726, 34.800, and 34.810. The Court will deny
 26 Respondents’ motion to dismiss, to the extent it is made on procedural
 27 default grounds, without prejudice to Respondents asserting their
 28 procedural default defense in their answer.

The parties’ further briefing regarding the alleged procedural default
 of Moore’s claims—in Respondents’ answer, Moore’s reply, and
 Respondents’ response to the reply—should, as to each claim allegedly
 procedurally defaulted, explain if, when, and where that claim, or a similar
 or related claim, was asserted in state court, and explain whether the
 claim was ruled procedurally barred in state court, so as to result in the
 procedural default of the claim in this action. This analysis should be set
 forth—in a clear, understandable manner—for each separate claim
 allegedly procedurally defaulted. The parties’ further briefing must, of
 course, also address the merits of each of Moore’s remaining claims.

Order entered February 26, 2021 (ECF No. 139), pp. 17–22.

In his motion for reconsideration, Moore first argues that the Court overlooked his
 arguments that Nev. Rev. Stat. §§ 34.726 and 34.800 are not adequate to support
 application of the procedural default doctrine. Motion for Reconsideration (ECF No.
 140), pp. 2–3. Moore points to the following language in the order:

Moore does not place the adequacy of those rules at issue. Accordingly,
 this court concludes that Nev. Rev. Stat. §§ 34.726 and 34.800 are
 adequate to support application of the procedural default doctrine in this
 case.

1 Order entered February 26, 2021 (ECF No. 139), p. 21. Moore argues that this passage
2 indicates that the Court did not consider his argument that Nev. Rev. Stat. §§ 34.726
3 and 34.800 are inadequate. This is a misreading of the order. The Court recognized
4 Moore's argument that Sections 34.726 and 34.800 are inadequate. However, applying
5 the burden-shifting analysis prescribed by the court of appeals in *Bennett*, and phrasing
6 its ruling in the terms used in *Bennett*, this Court ruled that Moore did not meet his
7 burden of proof—he did not “place the adequacy of those rules at issue.” Order entered
8 February 26, 2021 (ECF No. 139), p. 21. In short, the Court did not overlook Moore's
9 argument.

10 Moore also contends in his motion for reconsideration that the February 26,
11 2021, order “is unclear as to whether it considered Moore's argument that the Nevada
12 Supreme Court did not clearly and expressly apply Nev. Rev. Stat. §§ 34.726 & 34.800
13 to his claims or whether the Court deems this argument more appropriate for
14 consideration after additional briefing.” Motion for Reconsideration (ECF No. 140), pp.
15 3–5. The February 26, 2021 order makes clear that, with respect to Respondents'
16 procedural default defense, the Court ruled only on the issue of the adequacy of Nev.
17 Rev. Stat. §§ 34.726, 34.800 and 34.810. See Order entered February 26, 2021 (ECF
18 No. 139), p. 22, lines 3–5 (“Beyond the question of the adequacy of NRS §§ 34.726,
19 34.800, and 34.810, the Court will not, in this order, address the remainder of the issues
20 raised by the parties concerning the alleged procedural default of Moore's claims.”), and
21 lines 12–14 (“The Court will, therefore, decline to address the procedural default issues
22 raised by this motion—other than the question of the adequacy of NRS §§ 34.726,
23 34.800, and 34.810.”). The Court did not rule on the question whether the Nevada
24 Supreme Court clearly and expressly applied Sections 34.726 and 34.800 to his claims;
25 the Court will rule on that issue in conjunction with the merits of Moore's claims, after
26 Respondents file an answer and Moore files a reply.

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10 DATED April 12, 2021.

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